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7

**UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

8

9 MACKENZIE ANNE THOMA, a.k.a.  
10 KENZIE ANNE, an individual and on  
behalf of all others similarly situated,

11 Plaintiff,

12 v.

13 VXN GROUP LLC, a Delaware limited  
liability company; STRIKE 3  
14 HOLDINGS, LLC, a Delaware limited  
liability company; GENERAL MEDIA  
15 SYSTEMS, LLC, a Delaware limited  
liability company; MIKE MILLER, an  
16 individual; and DOES 1 through 100,  
17 inclusive,

18 Defendants.

19 CASE NO: 2:23-cv-04901-WLH  
(AGRx)

20 [Assigned for all purposes to the Hon.  
Wesley L. Hsu]

21

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS COMPLAINT AND CLASS  
CLAIMS**

22 [Filed Concurrently with Plaintiff's  
Evidentiary Objections to Declaration of  
Brad S. Kane]

23

**HEARING INFORMATION**

24 DATE: July 28, 2023  
TIME: 1:00 p.m.  
COURTRM: 9B

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# **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

Plaintiff Mackenzie Anne Thoma (“Plaintiff” or “Ms. Thoma”) hereby submits the following opposition to defendants VXN Group LLC (“VXN”); Strike 3 Holdings, LLC (“Strike 3”); General Media Systems, LLC (“GMS”); and Mike Miller (“Miller” and collectively with VXN, Strike 3, and GMS, “Defendants”) Motion to Dismiss Complaint and Class Claims (the “Motion”).

After first demanding that this action be heard in federal court and not in the California state court where Ms. Thoma originally filed it, Defendants now appear unable to comply with even the most basic of rules in their chosen forum. Indeed, Defendants *admit* that their counsel failed to comply with Local Rule 7-3, requiring that counsel meet and confer seven (7) days prior to filing any motion in this Court. See Dkt. #9, p.3. As Defendants unilaterally sought to litigate this action before this Court and not in state court, they cannot now play fast and loose with this Court's rules of procedure. In light of this unequivocal failure and given that Plaintiff intends to challenge the existence of federal jurisdiction over this action, the Court should exercise its discretion to decline to hear the Motion, delay ruling until jurisdictional issues are resolved, or take other remedial steps as necessary.

Nor, looking past the Motion’s procedural defects, do Defendants show that any of Plaintiff’s claims should be dismissed on their merits. Most notably, Defendants allege that Plaintiff’s state-law claims for unpaid overtime, meal period violations, and rest break violations are barred as a matter of law pursuant to an exemption under California law governing “professional actors employed in the motion picture industry[.]” *See* Dkt. #9, pp. 20-22 (citing Cal. Code Regs. tit. 8, § 11120, *hereinafter* “Wage Order 12”). Yet Defendants conspicuously fail to offer *any evidence whatsoever*—much less evidence that would be admissible on the procedural posture of the instant Motion—establishing either (1) that Ms. Thoma was or is a “professional actor,” or (2) that she was “employed in the motion picture industry,”

such as would be required to support a finding that Wage Order 12 applies. Indeed, in making this argument, Defendants ignore the *express allegations* of the Complaint stating that Plaintiff performed a variety of tasks for Defendants that do not reasonably fit the category of “professional acting,” including modeling. *See* Complaint, ¶ 8. It cannot seriously be disputed that *Defendants* bear the burden of establishing the elements of Wage Order 12’s exemption as an affirmative defense—not Plaintiff. Moreover, given the procedural posture of the instant Motion, Defendants are required to make any such showing *solely* on the basis of Plaintiff’s own pleading and any matter subject to judicial notice. *See ASARCO, LLC v. Union Pac. R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (“ASARCO”). Clearly, Defendants have not and cannot do so here, and the Motion thus must be denied on this ground.

None of Defendants’ other arguments advanced in support of dismissal of Ms. Thoma’s Complaint carry any weight, either. The Complaint alleges adequately specific factual support for each and every one of the causes of action asserted against Defendants, and none of Plaintiff’s derivative claims are subject to dismissal on the basis that Plaintiff cannot recover on her claims for direct violations of the California Labor Code. Plaintiff properly asserts her claim for waiting time penalties pursuant to the California Labor Code, and the Complaint further alleges multiple plausible theories of liability for each of the Defendants named in the Complaint. To the extent that the Court is inclined to rule on the merits and grant the Motion as to any of these claims, Plaintiff respectfully contends that she is entitled to amend her Complaint to reallege any of her claims deemed to be defective.

Plaintiff thus humbly requests that the Court deny Defendants’ Motion in its entirety. Alternatively, Plaintiff respectfully requests leave to amend.

## II. **LEGAL STANDARDS**

### A. **Fed. R. Civ. P. 12(b)(6)**

A plaintiff in federal court is required to give only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). While

1 the Federal Rules of Civil Procedure (“FRCP”) allow a district court to dismiss a  
2 cause of action for “failure to state a claim upon which relief can be granted,” they  
3 also require all pleadings to be “construed so as to do justice.” Fed. R. Civ. P. 12(b)(6),  
4 8(e). With this principle in mind, “[t]he Ninth Circuit is particularly hostile to motions  
5 to dismiss under Rule 12(b)(6)[,]” and applies “a powerful presumption against  
6 rejecting pleadings for failure to state a claim.” *Angiano v. Anheuser-Busch InBev*  
7 *Worldwide, Inc.*, 532 F.Supp.3d 911, 916 (C.D. Cal. 2021) (quoting *Gilligan v. Jamco*  
8 *Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997)). It is thus typically enough to withstand  
9 dismissal that a pleading “give[s] the defendant fair notice of what the ... claim is and  
10 the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
11 (“*Twombly*”) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

12 On a motion to dismiss a complaint for failure to state a claim under FRCP  
13 12(b)(6), the court must assume as true all allegations contained in the complaint,  
14 “construing the pleadings in the light most favorable to ... the nonmoving party.”  
15 *Love v. Marriott Hotel Servs., Inc.*, 40 F.4th 1043, 1045 (9th Cir. 2022). Indeed, a  
16 district court’s order of dismissal will be affirmed “only if it is clear that no relief  
17 could be granted under any set of facts that could be provided consistent with the  
18 allegations.” *Enesco Corp. v. Price/Costco Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998)  
19 (quoting *Cervantes v. City of San Diego*, 5 F.3d 1273, 12774 (9th Cir. 1993)). “It need  
20 not appear that plaintiff can obtain the specific relief demanded as long as the court  
21 can ascertain from the face of the complaint that *some* relief can be granted.” *Massey*  
22 *v. Banning Unif. Sch. Dist.*, 256 F.Supp.2d 1090, 1092 (C.D. Cal. 2003) (quoting *Doe*  
23 *v. U.S. Dep’t of Justice*, 753 F.2d 1092, 1104 (D.C. Cir. 1985)).

24 **B. Pleading Standards**

25 The purpose of sufficiently pled claims is “to give the defendant fair notice of  
26 what the... claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555.  
27 While factual allegations challenged under FRCP 12(b)(6) must not be speculative,  
28 the United States Supreme Court has held that the federal rules do “not requir[e]

heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Id.* at 547; *accord. Ashcroft v. Iqbal*, 556 U.S. 662, 662 (2009).

Furthermore, in ruling on a 12(b)(6) motion, a court cannot generally consider material outside of the complaint, such as facts or allegations presented in briefs, affidavits, or discovery materials. *See Levine v. Diamanthuset, Inc.*, 950 F.2d 1478, 1483 (9th Cir. 1991), *overruled on other grounds, Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994). If matters or factual allegations outside the pleadings are considered, the motion should instead be treated as a motion for summary judgment under Rule 56, and “[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” Fed. R. Civ. P. 12(d). Thus, dismissal is especially disfavored in cases where the complaint sets forth a legal theory “that can best be assessed after factual development.” *McGary v. City of Portland*, 386 F.3d 1259, 1270 (9th Cir. 2004) (internal quotes omitted).

Nevertheless, if the “plaintiffs … have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.” *Twombly, supra*, 550 U.S. at 570. However, “[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and ‘that a recovery is very remote and unlikely.’” *Id.* at 556. Even a request for an improper remedy for a claim is not grounds for dismissal so long as the court can ascertain from the face of the complaint that *some* relief can be granted. *See Massey, supra*, 256 F. Supp. 2d at 1092.

With respect to affirmative defenses, it is the defendant, *not* the plaintiff, asserting the defense that carries the burden of sufficiently pleading, so as to provide plaintiff with “fair notice of the defense.” *Wyshak v. City Nat. Bank*, 607 F.2d 824, 827 (9th Cir. 1979). On a motion to dismiss, a defendant must “establish the affirmative defense through either facts that the plaintiff had pleaded or facts that are subject to judicial notice.” *Durham v. Prudential Ins. Co. of Am.*, 236 F.Supp.3d 1140,

1 1150 (C.D. Cal. 2017). Thus, for example, a plaintiff is not required to plead *any* facts  
2 or allegations rebutting a defendant’s proposed affirmative defense to survive a  
3 motion to dismiss. *See, e.g., Frame v. City of Arlington*, 657 F.3d 215, 239-40 (5th  
4 Cir. 2011) (“[A] plaintiff is not required to allege that his claims were filed within the  
5 applicable statute of limitations.”)

6 Lastly, the court must also decide whether to grant the plaintiff leave to amend.  
7 *Impress Commc’n v. UnumProvident Corp.*, 335 F. Supp. 2d 1053, 1062 (C.D. Cal.  
8 2003). A court should “freely give” leave to amend when there is no undue delay, bad  
9 faith, dilatory motives on the part of the movant, undue prejudice to the opposing  
10 party by virtue of the amendment, or futility of the amendment. Fed. R. Civ. P. 15(a);  
11 *Foman v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is denied only  
12 when it is clear the deficiencies of the complaint cannot be cured by amendment.  
13 *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d. 655, 658 (9th Cir. 1992).

14 **III. LEGAL ARGUMENT**

15 **A. DEFENDANTS FILED THEIR MOTION IN VIOLATION OF THE**  
16 **LOCAL RULES AND IT SHOULD THUS BE SUMMARILY**  
17 **DISMISSED**

18 Even before reaching the merits, the Court may properly dispose of the pending  
19 Motion on the *undisputed* ground that Defendants failed to comply with the Local  
20 Rules in filing it. Specifically, Defendants admit that they filed the instant Motion  
21 without waiting for the mandatory seven (7) days from the meet-and-confer  
22 conference of counsel to elapse. *See Dkt. #9, p.3.* Defendants *alone* are responsible  
23 for this blatant violation of the Local Rules. Further, Defendants cannot justify their  
24 noncompliance on the ground that they were time-constrained to file the instant  
25 Motion, as Defendants specifically sought out this very forum in which to defend  
26 against Plaintiff’s claims and should not be permitted to pick and choose which of  
27 this Court’s rules they will and will not follow. Accordingly, the Motion is subject to  
28 dismissal or other remedial measures that the Court may deem proper.

1   ///

2         “Denial of a motion as the result of a failure to comply with local rules is well  
3 within a district court’s discretion.” *Tri-Valley CAREs v. U.S. Dep’t of Energy*, 671  
4 F.3d 1113, 1131 (9th Cir. 2012); *Burke v. Basil*, 2021 WL 5993524, at \*1 (C.D. Cal.  
5 Oct. 20, 2021) (denying motion where moving party failed to attach copies of alleged  
6 meet-and-confer correspondence). “In particular, it is within the court’s discretion to  
7 refuse to consider a motion based on a party’s noncompliance with Local Rule 7-3.”  
8 *Morales v. K. Chocolatier Inc.*, 2022 WL 19829446, at \*2 (C.D. Cal. Oct. 31, 2022).  
9 Compliance with the Local Rules is mandatory *regardless* of whatever other filing  
10 deadlines a party may be required to satisfy. *See Alcatel-Lucent USA, Inc. v. Dugdale*  
11 *Commc’ns, Inc.*, 2009 WL 3346784, at \*3-4 (C.D. Cal. Oct. 13, 2009) (denying  
12 motion to dismiss for defendant’s failure to comply with Local Rules meet-and-confer  
13 requirement where “Defendant waited until the last possible moment to challenge a  
14 complaint of which it was clearly on notice”).

15         Here, Defendants do not even attempt to dispute that they violated the Local  
16 Rules in filing the instant Motion, and in particular the Local Rules’ requirement that  
17 the parties meet and confer regarding the substance of a contemplated motion at least  
18 seven days in advance of filing any such motion. *See* Dkt. #9, p.3. Instead, Defendants  
19 imply that their violation of the Rules is justified because they simultaneously faced  
20 a deadline to file the instant Motion pursuant to FRCP 81. *See ibid.*

21         Defendants point to no legal authority to support their implicit assertion that  
22 the Local Rules are not binding on a party running up against another deadline, as  
23 none exists. Nor do Defendants acknowledge that the quandary of competing  
24 deadlines that purportedly compelled them to violate the Local Rules was entirely of  
25 their own making. Certainly, Plaintiff did not compel Defendants to wait to file their  
26 Notice of Removal until less than one week remained to respond to the Complaint.  
27 For that matter, it was Defendants themselves who unilaterally chose to proceed in  
28 federal court, rather than in the state court where Plaintiff originally filed this action,

1 and thus Defendants who elected to proceed subject to the quicker pace and shortened  
2 timelines of the Central District. Under these circumstances, Defendants' proffered  
3 "justification" for their blatant violation of the Local Rules lacks merit.

4 Worse, Defendants' evidently willful violation of the Local Rules has directly  
5 prejudiced Plaintiff's ability to litigate her case. Specifically, Defendants' violation  
6 of the Local Rules has effectively ensured that Plaintiff is forced to respond—and the  
7 Court to adjudicate—on the merits of Defendants' challenge to Plaintiff's substantive  
8 case *before* Plaintiff can raise her intended challenge to the Court's jurisdiction by  
9 way of a noticed motion for remand. In other words, by virtue of their blatant violation  
10 of the Rules and through no fault of Plaintiff's own, Defendants have potentially  
11 precluded any real consideration by this Court of Plaintiff's contemplated motion for  
12 remand, as it may be rendered moot by an adverse ruling on the instant Motion.

13 The Court should not permit Defendants to profit from this blatant corner-  
14 cutting and rule-breaking behavior. Indeed, the Court may choose in its sound  
15 discretion to dismiss the Motion altogether on this basis. *See Pina v. Lewis*, 717 Fed.  
16 App'x 739, 740 (9th Cir. 2018). At a minimum, however, Plaintiff respectfully notes  
17 that the Court may choose to delay any ruling on the substance of Defendants' Motion  
18 until a resolution has been reached as to Plaintiff's contemplated motion for remand,  
19 which she intends to file shortly.

20 **B. THE COURT SHOULD DECLINE TO RULE ON THE MERITS OF**  
21 **THIS CASE UNTIL THRESHOLD JURISDICTIONAL ISSUES**  
22 **ARE RESOLVED**

23 Regardless of how the Court addresses Defendants' violation of the Local  
24 Rules, however, Plaintiff submits that any ruling on the instant Motion would be  
25 improper in any event unless and until the issue of the Court's subject-matter  
26 jurisdiction over the action is resolved.

27 For a federal court to act, a finding that federal jurisdiction exists over the action  
28 is essential to the exercise of any of its judicial powers. Indeed, "subject-matter

1 jurisdiction, because it involves a court’s power to hear a case, can never be forfeited  
2 or waived.” *U.S. v. Cotton*, 535 U.S. 625, 630 (2002). Even in the absence of a  
3 challenge by a party, district courts have an independent duty to evaluate whether  
4 subject-matter jurisdiction exists. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574,  
5 583 (1999). If the district court finds that no such federal jurisdiction exists, “the court  
6 is not in a position to act and its decisions cannot generally be enforced.” *Toumajian*  
7 *v. Frailey*, 135 F.3d 648, 652 (9th Cir. 1998). Thus, jurisdiction is a threshold issue  
8 that *must* be resolved before the court may proceed to consider other issues. See *U.S.*  
9 *Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 79-80 (1988).

10 Plaintiff intends to lodge a compelling challenge to this Court’s jurisdiction  
11 shortly in the form of a Motion for Remand. Any ruling on the instant Motion should  
12 thus be delayed unless and until such time as it has been shown that jurisdiction exists  
13 in this Court.

14 **C. DEFENDANTS FAIL TO PROVE ON THE MERITS THAT ANY  
15 OF PLAINTIFF’S CLAIMS ARE SUBJECT TO DISMISSAL**

16 **1. Plaintiff Alleges Sufficiently Specific Factual Allegations in  
17 Support of All Claims Asserted Herein**

18 Defendants’ primary substantive challenge to the Complaint’s first, second,  
19 third, fourth, sixth, eighth, and ninth causes of action (seeking damages for unpaid  
20 overtime, unpaid minimum wages, meal period violations, rest break violations, wage  
21 statement violations, failure to indemnify, and failure to pay vested vacation time,  
22 respectively) is that Plaintiff alleges insufficient factual detail to support a claim for  
23 relief under the federal pleading standards. This contention fails to carry weight.

24 Defendants first appear to contend that Ms. Thoma’s Complaint is factually  
25 deficient because various other complaints in wholly separate actions filed by her  
26 counsel were deemed deficient by other federal district courts. See Dkt. #9, p.11; Dkt.  
27 #9-1, ¶¶ 4-10. This argument fails first because none of these purported complaints is  
28 admissible here, and indeed the Declaration of Brad Kane, counsel for Defendants,

1 purporting to introduce these documents as exhibits, fails woefully to authenticate or  
2 provide any foundation for this purported evidence whatsoever, among other defects.  
3 *See generally* Plaintiff's Evidentiary Objections. Nor do Defendants make any real  
4 effort to explain precisely how these purported complaints in completely unrelated  
5 cases have anything to do with the narrow legal issue here: whether *Plaintiff's*  
6 Complaint states a plausible claim for relief on the causes of action alleged. Thus,  
7 these documents should be ignored completely.

8 Defendants argue at length that Plaintiff's factual allegations do not satisfy the  
9 pleading standard applied in federal court, apparently oblivious that Plaintiff filed her  
10 Complaint in California state court and thus it was not drafted with federal pleading  
11 standards in mind. Because this action belongs in state court and is not properly before  
12 this Court, there is no proper basis to apply federal law to Plaintiff's Complaint. Thus,  
13 the Court should decline to grant Defendants' requested dismissal on this ground.  
14 However, to the extent that this Court is inclined to apply federal law and find any of  
15 Plaintiff's claims defective for a lack of factual support, Plaintiff respectfully requests  
16 leave to amend, as set forth more fully below, *see* § V.D.

17 **2. Defendants Fail to Allege Any Facts in Support of their  
18 Affirmative Defense that Plaintiff and Class Members Are  
19 Exempt under the Applicable Wage Order.**

20 Next, Defendants contend that Plaintiff's claims for unpaid overtime, meal  
21 period violations, and rest break violations are also barred on the further ground that  
22 Plaintiff and Class Members are purportedly subject to an exemption from  
23 California's general wage-and-hour protections under the California Wage Order for  
24 the "motion picture industry." *See* Dkt. #9, pp. 20-23. This contention flatly fails,  
25 however, as Defendants have not identified any basis in Plaintiff's Complaint to show  
26 as a matter of law that this affirmative defense applies and bars *any* of Plaintiff's or  
27 other Class Members' claims.

Under substantive California state law, exemptions from general wage-and-hour protections pursuant to an applicable wage order “are affirmative defenses, and thus an employer bears the burden of proving that an employee is exempt.” *Combs v. Skyriver Commc’ns, Inc.*, 159 Cal.App.4th 1242, 1254 (Cal. 2008) (citing *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal.4th 785, 794-95 (Cal. 1999)). “Exemptions are narrowly construed against the employer[,]” and ““will not be found except [in contexts] plainly and unmistakably within [the given exemption’s] terms and spirit.”” *Eason v. Roman Catholic Bishop of San Diego*, 414 F.Supp.3d 1276, 1280 (S.D. Cal. 2019) (quoting *Haro v. City of L.A.*, 745 F.3d 1249, 1256 (9th Cir. 2014)). Thus, California law is unambiguous on this issue: at *any* point during this litigation, it is Defendants (and not Plaintiff or Class Members) who bears the burden to establish that an exemption—including the exemption for “professional actors” under Wage Order 12—applies to a specific employee.

Furthermore, Defendants’ challenge on this issue is constricted due to the procedural posture of the Motion. “Ordinarily, affirmative defenses may not be raised by motion to dismiss.” *Durham, supra*, 236 F.Supp.3d at 1150 (quoting *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984)). “Dismissal under Rule 12(b)(6) on the basis of an affirmative defense is proper only if the defendant shows some obvious bar to securing relief on the face of the complaint.” *ASARCO, supra*, 765 F.3d at 1004. Indeed, dismissal on the basis of an affirmative defense is generally proper “*only* in the relatively unusual case in which the plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to securing relief[.]” *Ibid.* (internal quotes omitted) (emphasis added).

Here, Defendants have not even *attempted* to make the requisite showing on the basis of Plaintiff’s Complaint or evidence subject to judicial notice to establish that Ms. Thoma was a “professional actor” who worked in the “motion picture industry” as required to subject her to Wage Order 12’s exemptions. Defendants merely cite to the allegedly applicable exemption in the allegedly applicable Wage

1 Order, and conclude their inquiry there. Indeed, after merely describing Wage Order  
2 12’s exemption for “professional actors” in the “motion picture industry,” Defendants  
3 bizarrely identify *no allegations in Plaintiff’s Complaint at all*, simply concluding  
4 without any explanation that Plaintiff’s overtime, meal period, and rest break claims  
5 must be dismissed “based on her exemption in the IWC Wage Order governing her  
6 profession and Defendants’ industry.” Dkt. #9, 22:9-10. This bare assertion is  
7 unsupported by any express allegation in Plaintiff’s Complaint. Indeed, Defendants’  
8 assertion that Plaintiff was a “professional actor” within the meaning of Wage Order  
9 12 is *expressly contradicted by the Complaint’s express allegation* that Ms. Thoma  
10 performed tasks for Defendants such as modeling that could not reasonably be  
11 considered working as a “professional actor.” *See* Complaint, ¶ 8.

12 A mere assertion without any factual support, like Defendants make, that a  
13 state-law affirmative defense exists and applies to a state-law claim is simply not  
14 enough to establish that Defendants are entitled to an order dismissing any of  
15 Plaintiff’s claims, particularly at the pleading stage. Defendants’ affirmative defense  
16 is propped up by little more than a cursory review of caselaw that is not even relevant  
17 here, and a conclusory application of that law to what Defendants assume (but do not  
18 prove) to be the facts at hand. Defendants produce neither caselaw nor factual  
19 allegations from Plaintiff’s Complaint to support the conclusion that Plaintiff must,  
20 *as a matter of law*, be categorized as a “professional actor” subject to the provisions  
21 of Wage Order 12. This is of course not even to mention the various other Class  
22 Members, whose work responsibilities may have varied significantly from “acting.”  
23 Defendants simply have failed to show one way or another whether there is any basis  
24 for finding that *any* Class Member is a “professional actor.” Nor, for that matter, do  
25 Defendants show that they operate in the “motion picture industry,” as Wage Order  
26 12 defines it.

27 Defendants have done nothing more than point to a state-law exemption and to  
28 claim that it applies here, despite that there is absolutely *no* factual or legal support

1 for that conclusion. This is insufficient for Defendants to show any entitlement to the  
2 demanded dismissal of Plaintiff's claims for unpaid overtime, meal period violations,  
3 and rest break violations. *See Eason*, 414 F.Supp.3d at 1280-81 (denying motion to  
4 dismiss where defendants produced no evidence and pointed to nothing in the  
5 complaint establishing that wage order exemption applied to plaintiff). Accordingly,  
6 the Court should reject Defendants' claim that *any* of Plaintiff's claims are subject to  
7 dismissal on the basis of Wage Order 12 or any exemption thereunder.

8                   **3. None of Plaintiff's Derivative Claims are Properly Subject to  
9 Dismissal.**

10                  Defendants further seek the dismissal of Plaintiff's fifth cause of action for  
11 waiting time penalties pursuant to California Labor Code section 203, as well as her  
12 claim for unfair competition pursuant to California's Unfair Competition Law,  
13 codified at Business & Professions Code section 17200 *et seq.* ("UCL"), based on the  
14 premise that these claims are wholly derivative of other claims purportedly subject to  
15 dismissal. *See Dkt. #9*, pp. 23, 29.

16                  Because Defendants fail to establish that these predicate claims are properly  
17 subject to dismissal, however, there is no basis on which to dismiss the derivative  
18 claims. *See, e.g., Eason, supra*, 414 F.Supp.3d at 1281 (denying motion to dismiss as  
19 to derivative claims where defendants failed to establish that predicate claims must  
20 be dismissed.)

21                   **4. Plaintiff's Claim for Failure to Timely Pay Wages Is Not  
22 Subject to Dismissal for Lack of a Private Right of Action.**

23                  Next, Defendants target Plaintiff's claim for Defendants' failure to timely pay  
24 wages during employment on the ground that the California Labor Code purportedly  
25 does not furnish a private right of action for Plaintiff to enforce the right. This  
26 contention, however, distorts controlling California law and does not establish any  
27 grounds for dismissal of the claim.

28

1       As Defendants acknowledge, Labor Code section 204 creates substantive rights  
2 for California workers regarding the regular and timely payment of wages owed  
3 throughout employment, while Labor Code section 210 codifies the availability of  
4 civil penalties as the remedy for violations of that right. However, Defendants rely on  
5 outdated legal authorities to argue that the remedy provided under section 210 “are  
6 not recoverable by individual employees through a private lawsuit.” Dkt. #9, 25:13-  
7 14. This “statement[] of law rest[s] on a previous iteration of § 210, which dictated  
8 that failures to comply with § 204 were subject to civil penalties that were recoverable  
9 only by the California Labor Commissioner.” *Hansber v. Ulta Beauty Cosmetics,*  
10 *LLC*, 2021 WL 4553649, at \*12 (E.D. Cal. Oct. 5, 2021). The “statutory arrangement  
11 changed in 2019 when § 210 was amended to allow for employees to recover statutory  
12 penalties through[,]” *inter alia*, a “claim for civil penalties.” *Ibid.*; *see also Assembly*  
13 *Bill No. 673, Legislative Counsel’s Digest* (2019) (“This bill would … authorize the  
14 affected employee to bring an action to recover specified statutory penalties against  
15 the employer....”) This plainly evidences a “direct[]” purpose to create a right to sue  
16 “in clear, understandable, unmistakable terms.” *Vikco Ins. Servs., Inc. v. Ohio Indem.*  
17 *Co.*, 70 Cal.App.4th 55, 62 (1999). Defendants’ cited authority to the contrary  
18 precedes this express legislative command and is thus unavailing to Defendants’  
19 argument to the contrary.

20       As a result, Defendants cannot show that there exists no private right of action,  
21 and Plaintiff’s claim for failure to timely pay wages pursuant to Labor Code sections  
22 204 and 210 cannot be dismissed on that ground.

23                   **5. Plaintiff Adequately Asserts Claims against Defendants**  
24                   **Strike 3, GMS, and Miller under Alter Ego and Direct**  
25                   **Theories of Liability.**

26       Finally, Defendants contend that the Court must dismiss Defendants Strike 3,  
27 GMS, and Miller from the action on the ground that Plaintiff purportedly “pleads no  
28 facts to support including” them as parties. Dkt. #9, 30:3-4. This demand fails.

1        While it is not entirely clear in their Motion, Defendants appear to suggest that  
2 Plaintiff seeks to impose liability on Defendants Strike 3, GMS, and Miller solely on  
3 the basis of an alter ego theory. This interpretation, of course, finds no support in the  
4 language of the Complaint itself, which in fact states that all of the named Defendants  
5 acted together in a variety of capacities, including as joint employers and agents of  
6 each other. *See* Complaint, ¶¶ 14-15. Thus, Defendants are simply wrong to suggest  
7 that Plaintiff cannot recover against any of the Defendants without prevailing on the  
8 alter ego theory of liability.

Moreover, Plaintiff’s alter ego allegations are clearly more than sufficient to pass scrutiny at this early stage of litigation. “At the motion to dismiss stage, the pleading requirements for alleging an alter ego theory are ‘not strict.’” *Parker v. Country Oaks Partners, LLC*, 2023 WL 3149330, at \*3 (C.D. Cal. Mar. 22, 2023) (quoting *Unichappell Music, Inc. v. Modrock Prod., LLC*, 2015 WL 546059, at \*4 (C.D. Cal. Feb. 10, 2015)). “Because the most damning evidence of the ‘unity of interest and identity’ is often in the hands of the corporation and its principals and can be found nowhere else, it is sufficient for a plaintiff to plead only two or three of the factors showing unity of interest or identity to withstand a motion to dismiss.” *Ibid.* (cleaned up).

Given this lenient standard, Plaintiff's Complaint unquestionably survives dismissal. Plaintiff's Complaint clearly alleges that the named Defendants derived funding from each other in the course of perpetrating the unlawful conduct at issue, were separated as distinct entities in name only, and shared intermingled business affairs. *See* Complaint, ¶¶ 18(A)-(E). At this early stage, this is all the specificity that can be reasonably expected of Plaintiff. Thus, Defendants' demand that Defendants Strike 3, GMS, and Miller be dismissed as parties to this action clearly fails, and the Motion must be denied.

**D. TO THE EXTENT THE COURT GRANTS DEFENDANTS' MOTION, PLAINTIFF REQUESTS LEAVE TO AMEND**

1       A party has the right to amend his complaint “once as a matter of course at any  
2 time before a responsive pleading is served.” Fed. R. Civ. P. 15(a). A 12(b)(6) motion  
3 is not a responsive pleading, and therefore a plaintiff may amend as of right even after  
4 such a motion is filed. *See Nolen v. Fitzharris*, 450 F.2d 958, 958-59 (9th Cir. 1971);  
5 *St. Michael’s Convalescent Hospital v. California*, 643 F.2d 1369, 1374 (9th Cir.  
6 1981). Indeed, even where a party has amended his complaint once or a responsive  
7 pleading has been served, the Federal Rules provide that leave to amend should be  
8 “freely given when justice so requires.” Fed. R. Civ. P. 15(a). The Ninth Circuit  
9 requires that this policy favoring amendment be applied with “extreme liberality.”  
10 *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990).

11       Here, Defendants have not yet filed responsive pleadings in the instant action.  
12 As such, should the Court grant Defendants’ Motion, which it should not, Plaintiff  
13 should be permitted to file an amended complaint, as a matter of course, or with leave  
14 of court. Thus, in the event that the Court finds her pleading to be deficient, Plaintiff  
15 respectfully requests leave to amend.

16 **IV. CONCLUSION**

17       For the foregoing reasons, Plaintiff respectfully requests that the Court deny  
18 Defendants’ Motion in its entirety as procedurally improper and premature. Further,  
19 the Motion fails to establish on the merits that any of Plaintiff’s claims are legally  
20 deficient and thus dismissal must be denied as to all claims and all parties. In the  
21 alternative, to the extent that the Court is inclined to grant dismissal as to any of her  
22 claims, Plaintiff respectfully asks that the Court grant her leave to amend.

23

24

Dated: July 7, 2023

BIBIYAN LAW GROUP, P.C.

25

26

/s/ *Sarah H. Cohen*

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DAVID D. BIBIYAN

JEFFREY D. KLEIN

SARAH H. COHEN

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28

1 Attorneys for Plaintiff, MACKENZIE ANNE  
2 THOMA, and on behalf of herself and all  
3 others similarly situated  
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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 8484 Wilshire Blvd., Suite 500, Beverly Hills, California 90021.

On December 23, 2021, I served the following document(s) described as **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6); DECLARATION OF DIEGO AVILES IN SUPPORT THEREOF** on:

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CDF LABOR LAW LLP  
707 Wilshire Boulevard, Suite 5150  
Los Angeles, California 90017

**Counsel for Defendant MORGAN TRUCK BODY, LLC and THOMAS JORDAN**

The above document(s) were served on the interested parties in this action as follows:

*All parties identified for Notice of Electronic Filing generated by the Court's CM/ECF system under the above-reference case number.*

BY ELECTRONIC MAIL: As follows: I am readily familiar with our office's practice of electronic mail transmission; on this date the document enumerated above was transmitted by electronic mail transmission and that the transmission was reported as complete and delivered, and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 23, 2021 at Beverly Hills, California.

/s/ *Diego Aviles*  
Diego Aviles

## **CERTIFICATE OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action; my business address is 8484 Wilshire Blvd., Suite 500, Beverly Hills, California 90211.

I certify that on July 7, 2023, I electronically filed the following document(s) described as **PLAINTIFF'S EVIDENTIARY OBJECTIONS TO EVIDENCE SUBMITTED BY DEFENDANTS IN THEIR MOTION TO DISMISS COMPLAINT AND CLASS CLAIMS**, and that they are available for viewing and downloading from the Court's CM/ECF system, and that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 7, 2023, at Beverly Hills, California.

/s/ Bryant Gamez

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Bryant Gamez